Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337

To: The Commission

PETITION FOR STAY
OF EAST ASCENSION TELEPHONE COMPANY, LLC

East Ascension Telephone Company, LLC ("EATEL"), pursuant to Section 1.43 of the Commission's Rules,[1] respectfully requests that the Commission grant this Petition for Stay of an order of the Wireline Competition Bureau released April 25, 2012 in the above-captioned proceedings,[2] while the Commission considers EATEL's Application for Review filed simultaneously herewith.[3] The Order purports to adopt a methodology consistent with the Commission's directives in the USF/ICC Transformation Order for establishing benchmarks for high cost loop support ("HCLS") in which the Commission directed the Bureau to employ statistical techniques to determine which companies should be deemed similarly situated,[4] and to compare the costs of similarly situated

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1 47 C.F.R. § 1.43.

2 *See Connect America Fund, High-Cost Universal Service Support*, Order, WC Docket Nos. 10-90 and 05-337, DA 12-646 (rel. April 25, 2012) ("Order").

3 *Connect America Fund, High-Cost Universal Service Support*, EATEL Application for Review of Action Taken Pursuant to Delegated Authority, WC Docket Nos. 10-90 and 05-337 (filed May 25, 2012) ("EATEL Application for Review").

4 *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on*

companies. However, as stated in EATEL's Application for Review, the Bureau has employed techniques that are unreliable by any objective measure, and has failed to explain its methodology sufficient for carriers such as EATEL to evaluate the results. As applied to EATEL, the Bureau has erred either in its development of independent variables for use in its quantum regression analysis ("QRA") or in its application of the QRA to EATEL. Without access to the underlying data and methods used by the Bureau, it is impossible to recreate the results reached by the Bureau, but EATEL believes there is ample evidence that the results constitute reversible error.[5]

I. SUMMARY OF RELEVANT FACTS

In the USF/ICC Transformation Order, the Commission directed the Bureau to finalize a benchmarking methodology to limit reimbursable capital and operating costs within HCLS, so that freed-up HCLS could be distributed to other carriers for new broadband investment.[6] The methodology adopted by the Bureau in its Order purports to limit HCLS for carriers in 100 study areas that have very high costs relative to their similarly situated peers, as well as to redistribute HCLS to carriers in approximately 500 study areas.[7] The Bureau estimates that implementation of its benchmarking methodology will result in USF support reductions of approximately $65 million for the

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Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 217 (2011) ("USF/ICC Transformation Order "); *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. Filed Dec. 8, 2011).

5 *See* EATEL Application for Review at 2.

6 Order, ¶ 3.

7 Order, ¶ 4.

100 study areas,[8] of which an abnormally large percentage – 19.6% -- will be borne by EATEL. These reductions in support are scheduled to begin July 1, 2012.[9] While the Bureau states in the Order that it adopts the methodology to determine carrier-specific benchmarks for rate-of-return cost companies consistent with the parameters established by the Commission,[10] the Bureau has failed to employ statistically reliable techniques, as required by the Commission; has used independent variables that are unreliable; has used some independent variables that cannot be verified; has improperly calculated the dependent variables to reduce the reimbursement of loop costs prudently incurred; and has established a benchmarking methodology that disproportionately impacts EATEL.

Based on its own analysis of data considered by the Bureau in developing benchmarks for USF support, EATEL has good cause to believe that there are significant errors in the model which warrant further review, and certainly these errors warrant a stay of the Order's effectiveness pending full Commission review and possible further actions.

The Bureau admits that the methodology it adopts in the Order suffers from relatively weak predictive power. Instead of applying a pseudo R-squared value of 90 percent, which is the value that is widely recognized to be reliably predictive, the Commission has relied on a 67 percent value for capital expenses and a 62 percent value for operating expenses.[11]

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8 Order, ¶ 5. As a result of the benchmarking methodology, approximately 500 study areas are expected to receive approximately $55 million in additional broadband investment support. *Id*.

9 Order, ¶ 5.

10 Order, ¶10.

11 *See* EATEL Application for Review at 4.

EATEL has stressed that the reliability of any statistical regression analysis depends on the quality of the independent variables employed, but as far as EATEL can tell, the Bureau appears to have used inaccurate and incomplete data from a number of sources, as well as to have inappropriately applied statistical techniques. The results of the Bureau's benchmarking is, therefore, not predictive.[12]

In order to understand why its costs are deemed non-reimbursable, EATEL has argued that it is necessary to know what variables were used, and how they were used. However, in a number of cases the Bureau has not revealed the underlying inputs used or their methodology for computing independent variables. Critically, the Bureau has not made public the process used to arrive at the specific inputs selected.[13]

The Bureau also committed a critical error in choosing allocated loop costs rather than total loop costs for the purpose of calculating operating expenses. In addition, EATEL believe the Bureau erred in including operating taxes in the opex calculation. These errors render the Bureau's QRA unreliable.[14]

Finally, the combination of all the errors in the Order has resulted in EATEL bearing an abnormally large portion – almost 20% -- of the approximately $65 million HCLS reductions, amounting to a $12,766,899 reduction of the company's HCLS, which is roughly 73.4 percent of the company's 2011 HCLS receipts. These reductions will be disproportionately borne by EATEL and will have the impact of reducing its operating cash flow by nearly one-third, causing significant operational issues for the company, and

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12 *See* EATEL Application for Review at 5.

13 *See* EATEL Application for Review at 7-8.

14 *See* EATEL Application for Review at 8-9.

threatening the company's ability to attract capital for broadband investment. Reductions of this kind will have grave consequences for EATEL customers and employees.[15]

II. THE LEGAL STANDARDS FOR A STAY APPLY

The Bureau may grant a stay pending review of an application for review "in its discretion."[16] That standard is more flexible than the judicial standard for obtaining a stay. The Commission has previously granted stays when the petitioner has not shown a likelihood of success on the merits, and even when there has been no showing of "irreparable injury."[17] In the instant case there is a showing by EATEL of the irreparable harm it will experience if the Order is allowed to become effective pending the Commission's review of the EATEL Application for Review. Specifically, EATEL expects the staggering loss of HCLS to result in loss on nearly one-third of its cash flow and thereby causing significant operational issues, threatening the company's ability to invest in broadband, and ultimately being highly disruptive for EATEL customers and employees. On this basis the Bureau should exercise its discretion and grant this Petition for Stay.

The Bureau should grant this Petition for Stay regardless of whether it employs the judicial "four-prong test" for obtaining a stay. Notably, the Commission has found that in administrative proceedings such as this one that "[t]here is no requirement that there be a showing as to each criterion. The relative importance of the four criteria will vary depending upon the circumstances of the case. If there is a particularly

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[15] *See* EATEL Application for Review at 9-10.

[16] *See* 47 C.F.R. § 1.102(b)(3).

[17] *See e.g., Angeles Broadcasting Network*, 59 R.R. 2d 758 (1985) (stay granted to avoid interruption of service to public despite agency conclusion that petition lacked merit); *Lompoc Valley Cable TV*, 1 R.R. 2d 1081 (1964) (stay granted due to policy questions raised by the petition).

overwhelming showing in at least one of the factors, we may find that a stay is warranted notwithstanding the absence of another one of the factors."[18] The threats to EATEL's customers and employees, resulting from significant operational difficulties and inability to further invest in broadband, are critical reasons for granting a stay even in the absence of any other factors.

Even applying the judicial "four-prong test" that governs appeals of agency decisions, the Bureau should find that EATEL has met all four of the prongs and still grant the Motion for Stay.[19] As discussed above, EATEL has demonstrated the likelihood of irreparable harm (second prong) if a stay is not granted pending the Commission's review of its Application for Review. The amount of HCLS and cash flow that EATEL will lose, even in the short term, if the Commission ultimately reverses the Order, puts the company at risk of losing customers and employees.

EATEL submits that with regard to its likelihood of success on the merits (first prong), its Application for Review raises several serious questions that are at least "fair ground" for agency review.[20] Again, the Bureau has failed to employ statistically reliable techniques, as ordered by the Commission; has used independent variables that are unreliable; has used some independent variables that cannot be verified; has improperly calculated the dependent variables to reduce the reimbursement of loop costs prudently

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[18] *Implementation of Sections 309(i) and 337 of the Communications Act as Amended*, Order, WT Docket No. 99-87, 18 FCC Rcd 25491, ¶ 6 (2003).

[19] *See Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), *citing Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (1. strong showing that likely to prevail on the merits; 2. irreparable injury without relief; 3. whether stay would harm other interested parties; and 4. whether the public interest would be served by the stay)

[20] *See e.g., Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (injunctive relief may be granted when the petitioning party submits questions that are serious, substantial, difficult, doubtful, and "fair ground" for litigation).

incurred; and has established a benchmarking methodology that disproportionately impacts EATEL.

EATEL believes that no other parties would be harmed (third prong) by granting a temporary stay of the Order, pending the Commission's review of the Order. Finally, the public interest is served (fourth prong) by granting a stay. As explained in the Application for Review, even if the QRA produces anomalous results only with respect to EATEL, inaccurate outputs for any carrier's opex and capex will affect the validity of the regression analysis as a whole, because all carriers are being compared to one another. Therefore, a stay is necessary to give the Commission an opportunity to assess the reliability of the QRA overall. Moreover, a stay of the July 1 effective date will enable EATEL to continue operating without suffering immediate losses of HCLS and cash flow, pending the Commission's review of the Order, and give EATEL time to seek a waiver of the QRA if necessary. There is no need to risk disruption in investment and potentially in services to customers that might result from the July 1 implementation of the Bureau's Order, particularly if EATEL loses employees as a result of the Order taking immediate effect. Customers and workers should not suffer pending the Commission's review of the Order.

III. CONCLUSION

For the foregoing reasons, EATEL respectfully requests that the Bureau grant this Petition for Stay pending the Commission's review of EATEL's Application for Review.

Respectfully submitted,

/s/

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